

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:

THE GATEWAY DEVELOPMENT GROUP, INC.,

Debtor.

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HOWARD MAGALIFF, TRUSTEE and
JAMES CARNICELLI, JR.,

Plaintiffs,

vs.

JOHN J. FARERI, JULIE FARERI, and
CHRISTOPHER SHESKIER,

Defendants.
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Chapter 7

Case No.: 21-22304-rdd

Adv. Proc. No.: 21-07093-rdd

**ORDER ON MOTION TO DISMISS CERTAIN CLAIMS IN ADVERSARY
PROCEEDING**

Upon the Notice of Motion, dated December 13, 2021 [Dkt. 11] of Defendant John J. Fareri (“Fareri”) and the papers submitted therewith in support thereof, including the Declaration of Leonard Benowich, Esq. (Dkt. 11-1) and the Exhibits annexed thereto, including the Amended Complaint [Dkt. 11-2], for entry of an order, pursuant to Fed. R. Bankr P. 7009 and 7012, incorporating Fed. R. Civ. P. 9(b) and 12(b), dismissing each of the claims asserted by Plaintiff James Carnicelli, Jr. (“Carnicelli”) as described therein against Fareri, namely the First, Second, Third, and Fourth Causes of Action in the Amended Complaint (the “Motion”); and due and sufficient notice of the Motion having been given; and upon Carnicelli’s Memorandum of Law in opposition to the Motion [Dkt. 14] and Fareri’s Reply Memorandum in further support of the Motion [Dkt. 15]; and upon the record of the hearing held by the Court on

the Motion on January 24, 2022 (the “Hearing”), which is incorporated herein; and the Court having jurisdiction over the Motion under 28 U.S.C. §§ 157(a)-(b) and 1334(b); and, after due deliberation and for the reasons stated by the Court in its bench ruling at the Hearing, good and sufficient cause appearing for the relief granted herein, it is hereby

ORDERED, that:

1. The Motion’s request for an order dismissing the First Cause of Action is denied to the extent that the First Cause of Action seeks damages for breach of contract (i) to pay Carnicelli wages under the parties’ Shareholders’ Agreement [Dkt. 11-3] and (ii) improper removal of Carnicelli as president of The Gateway Development Group, Inc. under the parties’ Shareholders’ Agreement [Dkt. 11-3], and is otherwise granted as to the First Cause of Action;
2. The Motion’s request for an order dismissing the Second Cause of Action is denied in all respects;
3. The Motion’s request for an order dismissing the Third Cause of Action is denied to the extent that the Third Cause of Action seeks damages for breach of the implied covenant of good faith and fair dealing (i) to pay Carnicelli wages under the parties’ Shareholders’ Agreement [Dkt. 11-3] and (ii) improper removal of Carnicelli as president of the The Gateway Development Group, Inc. under the parties’ Shareholders’ Agreement [Dkt. 11-3], and is otherwise granted as to the Third Cause of Action;
4. The Motion’s request for an order dismissing the Fourth Cause of Action is granted in all respects;

5. Any dismissal provided in paragraphs 1 through 4 of this Order is without prejudice; provided, that Carnicelli shall have thirty (30) days from the date of this Order to move, pursuant to Fed. R. Bankr. P. 7015, incorporating Fed. R. Civ. P. 15, for leave to amend the Amended Complaint, which motion shall be accompanied by a copy of Carnicelli's proposed second amendment, blacklined to show changes as against the Amended Complaint, and if Carnicelli fails to timely file such a motion, the dismissals provided in paragraphs 1 through 4 of this Order shall be with prejudice; and
6. The time for Fareri to respond to the Amended Complaint is extended to and including the later to occur of that date which is ten (10) days after (a) the determination of Carnicelli's motion for leave to amend, if any, and (b) the expiration of the aforesaid 30-day period if Carnicelli has not made such a motion for leave to amend.

Dated: White Plains, New York
January 27, 2022

/s/Robert D. Drain
HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE